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No. 80-236

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEWMAN MEMORIAL HOSPITAL, INC., NEWMAN MEDICAL CENTER, INC., JOSEPH J. SMITH, M.D., and JACK T. DANCER, M.D.,
Petitioners,

VERSUS

DONNA BETH HACKNEY, Successor Administratrix of the Estate of Byrdie E. Blasdel, Deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October, 1980

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review a question which has been efficiently and effectively answered by the courts of appeal of the various circuits whose opinions are consistent and in harmony with each other.

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STATEMENT OF THE CASE

Respondent disagrees with the Petitioners' interpretation of facts stated in their "Statement of Case". However, Respondent does not take issue with Petitioners' specific statements because the bulk of them are not relevant to the question of whether certiorari should be granted. That determination can be made from the opinion below, *Hackney* v. *Newman Memorial Hospital, Inc.*, 621 F.2d 1069 (10th Cir. 1980).

REASONS FOR DENYING THE WRIT

This Court has stated that review by certiorari should be limited to,

> ". . . [C]ases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.* 349 U.S. 70, 79 (1955), citing *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

Although considerations governing review on certiorari are described in Rule 19, Rules of the Supreme Court of the United States, the quoted standard isolates the factors which are particularly applicable here. The quoted standard is not met in the instant action. Certiorari should be denied.

Although a consistent interpretation of 28 U.S.C. § 1359 is a matter of importance to the public, that need for interpretation is being efficiently and effectively met by the circuit courts of appeal. Far from there being "a real and embarrassing conflict of opinion and authority" among circuit courts, there has been basic harmony in interpreting 28 U.S.C. § 1359 since the Third Circuit decided *McSparran* v. *Weist*, 402 F.2d 867 (3rd Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

This is not to say that in applying 28 U.S.C. § 1359 the courts of appeal of the various circuits always sustain jurisdiction or always find it lacking. Obviously, the results they reach depend on the facts of the cases they

review. However, the rationale used in arriving at those determinations is consistent, and the decisions are basically compatible and in accord with each other.

It is apparent from the language of the Tenth Circuit's opinion which Petitioners seek to have reviewed that it drew upon interpolation of this Court's pronouncements and the experience of other circuits in reaching its decision:

> "Drawing in part upon *Kramer* [v. *Carribean Mills, Inc.*, 394 U.S. 823 (1969)], other circuits have followed *McSparran*. *See, e.g., Bishop* v. *Hendricks,* 495 F.2d 289 (4th Cir. 1974), *cert. denied,* 419 U.S. 1056 (1974); *Rogers* v. *Bates,* 431 F.2d 16 (8th Cir. 1970); *O'Brien* v. *AVCO Corp.,* 425 F.2d 1030 (2d Cir. 1969). *See generally,* 14 C. Wright, A. Miller & E. Cooper, *Federal Prac. & Proc.:* Jurisdiction § 3640 (1976). In several of these cases the parties admitted the sole reason for the out-of-state fiduciary was to achieve diversity jurisdiction, as was permitted under the *Corabi* rule. *E.g., O'Brien* v. *AVCO Corp., supra.* The courts following *McSparran,* however, have emphasized that the purpose for which the representative was appointed is but one of the factors the court should consider. *E.g., Bishop* v. *Henricks, supra; Lester* v. *McFaddon,* 415 F.2d 1101 (3rd Cir. 1969). Although they found appointment of straw parties as fiduciaries solely to obtain diversity jurisdiction was collusive within section 1359, in dictum they declared or inferred that if the appointed representative has a substantial relationship to the litigation the result would be different. *See, e.g., Bishop* v. *Hendricks,* 495 F.2d at 295. The instant case tests the dictum." 621 F.2d at 1070-71.

The concurring opinion in the instant action indicates a failure to endorse one of the tests used by the Third Circuit—inquiry into qualifications of the non-resident fi-

duciary per *Groh* v. *Brooks*, 421 F.2d 589 (3rd Cir. 1979). However, no conflict with the Third, or any other Circuit, is manifested by the Tenth Circuit's opinion here recognizing the citizenship for diversity purposes of a non-resident fiduciary who has a real, substantive stake in the litigation and is not a mere straw party. As the court below observed:

> "Under Oklahoma law the administrator, if there is one, must bring the wrongful death action and distribute any proceeds recovered directly to the statutory beneficiaries. [Cite omitted.] The administrator, in whom the cause of action inheres, has full authority to conduct the litigation; the beneficiaries have no right to settle, control or otherwise dispose of the action. [Cite omitted.] Also, plaintiff here is a beneficiary entitled to a portion of any proceeds recovered in the suit. [Cite omitted.] Because plaintiff has a real, substantive stake in the litigation she is not a straw party. . . .
>
> * * * *
>
> "There was a vacancy in the office of administratrix of the estate; plaintiff is a statutorily preferred replacement. [Cite omitted.] . . ." 621 F.2d, at 1071.

Petitioners have attempted to induce a perception of conflict among the circuits by isolating language from various opinions. The extent of their effort is underscored by comparison of the leading non-resident fiduciary case, *McSparran* v. *Weist, supra,* and its progeny with an assignment case, *Ferrara* v. *Philadelphia Laboratories, Inc.*, 272 F.Supp. 1000 (D. Vt. 1967), *aff'd* on opinion below, 393 F.2d 934 (2d Cir. 1968). Even in that situation the holdings are consistent. The cases are varied as the facts, but the basic rationale is the same. Where the sole purpose as judged

by objective factors is the creation of diversity of citizenship to invoke federal jurisdiction, there is collusion within the meaning of 28 U.S.C. § 1359 because a fiduciary is appointed as a representative in state court proceedings in the absence of factors which the state court would normally consider. On the other hand, where there is a valid purpose for appointment and consanguinity between decedent and representative, there is no impropriety or collusion within the meaning of 28 U.S.C. § 1359. *Joyce* v. *Seigel,* 429 F.2d 128 (3rd Cir. 1970), *O'Brien* v. *Stover,* 443 F.2d 1013 (8th Cir. 1971). Here factors which the state court would normally consider—consanguinity, a statutory preference and entitlement to a portion of any proceeds recovered in the suit—were present. Hence, impropriety or collusion was absent. The opinion below is in accord with other courts of appeal. There is no "embarrassing conflict of opinion and authority" among the circuits. Cases vary as do the facts, but courts uniformly focus on objective factors, such as the real, substantive stake in the outcome by the representative, to determine if the representative is or is not a straw party appointed for the sole purpose of creating federal jurisdiction.

In their zeal to obtain review by this Court, Petitioners have confused debate concerning abolition of diversity jurisdiction with interpretations of 28 U.S.C. § 1359. Diversity jurisdiction is a creature of statute (28 U.S.C. § 1332) and its abolition is not a matter appropriately raised by the instant action. Petitioners cite a statement by the American Law Institute condemning deliberate creation of diversity jurisdiction. The context of the statement is the A.L.I. position urging *legislation* to provide imputation of

the decedent's citizenship to his representative. *ALI Study of Division of Jurisdiction Between Federal and State Courts* (Official Draft, 1969) § 1301(b)(4) at 117-19. That was at a time when the restrictive interpretation placed on 28 U.S.C. § 1359 by *Corabi* v. *Auto Racing, Inc.*, 264 F.2d 784 (3rd Cir. 1959), allowed widespread creation of diversity jurisdiction in cases involving representative plaintiffs whenever the law of the state of appointment allowed non-residents to serve. Between *Corabi* in 1959 and *McSparran* v. *Weist* in 1968, the American Law Institute found that 20.5 percent of diversity cases in the Eastern District of Pennsylvania involved appointment of non-resident representatives. *ALI Study of the Division of Jurisdiction Between State and Federal Courts* 122-23 (Tent. Draft No. 1, 1963). The courts of appeal of the various circuits, led by the Third Circuit in *McSparran* v. *Weist*, have effectively and efficiently met this problem by disregarding the citizenship of a straw party for purposes of determining diversity.

The pros and cons of Congressional revision of 28 U.S.C. § 1359 are not a matter appropriately raised by the instant action. The "considerable urgency" of manufactured jurisdiction cited by Petitioners, was a problem twelve years ago. It has been efficiently and effectively dealt with by the courts of appeal of the various circuits which decide questions on a case by case basis with consistent interpretations of 28 U.S.C. § 1359.

CONCLUSION

This Court should not be burdened with review of the instant action. Precedent commands that review by certiorari be limited to matters of public importance and "real and embarrassing conflicts" among the circuit courts of appeal. Interpretation of 28 U.S.C. § 1359 is consistent among the circuit courts which have efficiently met questions of public import which concern this statute.

Respectfully submitted,

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October, 1980

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the instrument to which this certification is attached, were served, by placing same in the U. S. Mail, with postage fully prepaid thereon, to the following:

James D. Foliart and
Glenn D. Huff
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Oklahoma City, Oklahoma 73102

John Wiggins
1350 Liberty Tower
Oklahoma City, Oklahoma 73102

by the undersigned, a member of the Bar of this Court, this _____ day of October, 1980.

All parties required to be served have been served.

Gomer Smith, Jr.